

Contract and Fiscal Law Developments of 1998—The Year in Review

*Major David A. Wallace
Major Mary E. Harney (USAF)
Lieutenant Colonel Anthony M. Helm
Major David B. Freeman
Major Thomas L. Hong
Major Elizabeth D. Berrigan
Major Jody M. Hehr
Colonel Richard L. Huff
Colonel Jonathan H. Kosarin
Lieutenant Colonel Karl M. Elcessor
Lieutenant Colonel Steven N. Tomanelli (USAF)
Lieutenant Colonel John Moran
Major M. Warner Meadows (USAF)
Major Richard W. Rousseau*

CONTENTS

I. FOREWORD.....	1
II. CONTRACT FORMATION	1
A. Authority.....	1
1. AT&T: Hanging By A Wire.....	1
2. To Write or Not To Write: When a Contract May Be Implied-In-Fact	2
3. Contractor Jeopardy: Authority Has Limits!	3
B. Competition.....	4
1. Army and Air Force Chastised for Violating the Competition in Contracting Act (CICA).....	4
2. Beware of Out-of-Scope Modifications	5
3. Veterans Affairs' Restriction on Dosage Strength Creates Headache	6
4. Defense Logistics Agency (DLA) Permitted to Exercise Option at Lower Price Where Initial Contract Awarded on Sole-Source Basis	7
5. The GAO Defines "Expert": Rules Expert Exception Inapplicable	7
6. National Guard Bureau Did Not Improperly Bundle Requirements	9
7. Excess Pages Equal Disparate Treatment.....	9
8. Geographic Scope that Favors Incumbent Not Improper	10
C. Contract Types	11
1. Options.....	11
2. Indefinite Delivery Contracts	11

3. Task Order Contracting	13
4. Cost Contracts.....	14
D. Sealed Bidding.....	18
1. Late Bids.....	18
2. Mistake in Bids.....	21
3. Cancellation of the Solicitation	24
E. Negotiated Acquisitions	24
1. New DOD Scheme for Collecting and Evaluating Past Performance Information.....	24
2. Evaluation Factors	25
3. The Recalcitrant Referral: What Do You Do When No One Will Respond?.....	28
4. Urgent Call for “Roach Motels” Can Strike Competitor With Neutral Rating Dead.....	28
5. Scoring Past Performance With “Same or Similar Items”—Art or Science?.....	29
6. Discussions	29
7. Debriefings—Can You Be Too Brief?.....	31
8. Setting Competitive Ranges: The New Rule Looks a Whole Lot Like the Old Rule!.....	32
F. Simplified Acquisitions	32
1. One Day Insufficient Notice Period for Award of Sole-Source Procurement.....	32
2. Joining the 90s: Agency Can Require Submission of Electronic Quotes.....	33
3. Federal Acquisition Regulation Council Issues Final Rule on FAR Part 13 Reorganization	33
4. DFARS Proposed Rule Would Severely Restrict Non-Credit Card Micropurchases.....	33
G. Commercial Items.....	33
1. Was that Box of Household Goods Clearly Marked “Commercial Items”?	33
2. Subcontractor Clause Flow-down Slowdown	34
3. Exempting Commercial Item Buys from the Cost Accounting Standards.....	34
H. Bid Protests.....	34
1. The COFC’s General Order 38.....	35
2. Bid Protest Decisions.....	35
I. Alternative Dispute Resolution	38
J. Small Business	39

1. Pilot Program for Very Small Businesses.....	39
2. The DOD Issues Interim Rule on Subcontracting to Conform with <i>Adarand</i>	39
3. Women-Owned Businesses Get Increased Opportunities in 1998	39
4. Tenth Circuit Says Subcontractor Cannot Challenge DBE Set-Aside	40
5. Language in Solicitation Does Not Shackles Government	40
6. Small Disadvantaged Business Must Be Judged by Same Standards as Large Firms	41
7. More Rules and Regulations in 1998	41
8. SBS Appeals GSA's Decision to Consolidate Information Technology Schedules	43
9. Contracting Arrangement for 8(a) Contracts Changes in 1998.....	43
K. Labor Standards	43
1. The Service Contract Act (SCA).....	43
2. The Davis-Bacon Act (DBA)	45
L. Bond and Sureties	46
1. Stay Tuned for Changes to Payment Bond Requirements.....	46
2. Only Notice by Actual Surety Triggers Government's Duty to Withhold Contract Funds.....	46
3. Notice Not Required if Contract Requires Government to Withhold Funds.....	47
M. Commercial Activities and Service Contracting.....	49
1. Commercial Activities.....	49
2. Service Contracting	52
3. Privatization.....	53
III. CONTRACT PERFORMANCE	54
A. Contract Interpretation.....	54
1. Federal Circuit Finds Army Contract Contained Patent Ambiguity	54
2. Get This, Take That—And Don't Come Back!	54
B. Contract Changes	55
1. Agency Clause Supplementing the Standard Changes Clause is not a Deviation.....	55
2. Oral Modifications are Unenforceable	56
3. Unilateral Increase in Contractor's Pro Rata Share of Agency's Requirements is a Cardinal Change.....	57
C. Value Engineering Change Proposals (VECPs).....	57

1. The Times, They Are a Changin'!	57
2. Contractors Take a "Time-Out" from the VECP Process.....	57
3. No-Cost VECP	58
D. Pricing of Adjustments	58
1. Federal Circuit "Clarifies" <i>Eichleay</i> Again in 1998.....	58
2. Jury Verdict Method Tested in 1998.....	60
E. Inspection, Acceptance, and Warranties	61
1. Warranty Disclaimer Not Proof Against Every Incompetence.....	61
2. The Bane of Every Latent Defect Allegation: The Defective Specification	62
F. Termination for Default	62
1. Anticipatory Repudiation	62
2. Excessive Interference by NASA Results in Improper Termination.....	64
3. Board Converts T4D Motivated, in Part, by Contracting Out Plan.....	64
4. Defaulted Contractor May Be Excluded Automatically from Reprocurement	65
5. Dealing with a T4C Before the T4D is Decided	65
6. Water Tank Contract Termination for Default Found to Be Improper by Interior Board	66
G. Termination for Convenience	67
1. Decision to T4C Results in Breach.....	67
2. Navy Justified in Terminating a Contract for Convenience due to Faulty Estimates.....	68
3. Contractor Loses Right After Untimely Settlement Proposal	68
4. ABA Section Seeks to Change FAR Termination Language in 1998	68
H. Contract Disputes Act (CDA) Litigation.....	69
1. When Does a Claim Submission Become a Claim?.....	69
2. Government Must Pay to Depose Contractor's Expert	70
3. Tick-Tock, Tick-Tock, Attempted Delivery Starts the Clock.....	70
4. Parties Cannot Deprive Board of Jurisdiction by Agreement	71
5. ASBCA Permits Telephonic Testimony	72
6. Generic Reference Sufficient for Jurisdiction Purposes	72
7. EAJA Clock Starts When Parties Sign Settlement Agreement	73

8. GSBCA Cannot Force a <i>Hamilton</i> Stipulation.....	74
9. Has the Department of Transportation Contract Appeals Board Opened the Door to Claims for Pre-Award Expenses? 74	
10. How Long Can the Contracting Officer Take to Decide a Claim?.....	75
11. Poetic Justice	76
IV. SPECIAL TOPICS	76
A. Bankruptcy.....	76
B. Government Furnished Property.....	77
1. FAR Part 45, Where Are You?	77
2. GFP Decisions on Prior Contract Does Not Establish Bias	79
3. Unauthorized Disposition of GFP Bars Recovery.....	79
4. Failure to Provide Timely Notice of GFP Shortage Can Affect Recovery	79
C. Payment and Collection	80
1. Proposed Revisions to OMB Circular 125	80
2. New Proposed FAR Rule on Electronic Funds Transfer	80
3. The DOD Issues New Rules on Contract Financing	81
4. New Guidance from DOD on Progress Payment Distribut for Some Contracts.....	81
5. The GAO Reviews the DOD's Technology Initiatives for Contract Financing	82
D. Defective Pricing: Truth in Negotiations Act (TINA).....	82
E. Cost and Cost Accounting.....	83
1. Update: Cost Accounting Standards Board Review Panel	83
2. CAS Board Grants Waiver Authority	84
3. Current Use of Land Crucial for Calculating Costs	84
4. Consultant Costs Unallowable.....	84
F. Fraud	86
1. Board Voids Contract Tainted by Fraud	86
2. Circuit Court Tackles Issues of First Impression with Major Fraud Act.....	87
3. Ninth Circuit Reverses Twenty-Six Million Dollar Award Against DCAA	88
4. Ninth Circuit Holds that a Contracting Officer Lacks Standing to Pursue <i>Qui Tam</i> Action	89
G. Taxation	90

1. Burden of Investigating Tax Ramifications Is on the Contractor	90
2. Material Government Misrepresentation Leads to Reimbursement of Gross Receipts Tax	90
3. Special Assessment or Tax? What is the Plain Language of the Agreement?.....	90
H. Freedom of Information Act (FOIA)	91
I. Environmental Contracting.....	91
1. Comprehensive Guidelines for Buying Products Containing Recovered Materials	91
2. Protection of Stratospheric Ozone and Halon Manufacture: A Final Rule	92
3. Federal Compliance With Right-To-Know Laws.....	92
4. The GAO Reviews the DOD's Use of Single Contracts for Multiple Support Services.....	93
5. The GAO Upholds Solicitations Requiring Compliance with Local Environmental Requirements	93
6. New Executive Order on Recycling	93
J. Ethics in Government Contracting	94
1. OGE Proposes Changes to Standards of Ethical Conduct.....	94
2. DOD Issues Guidance on Procurement Integrity Rules	95
3. Small Talk Not Enough to Show Agency Bias.....	96
4. Organizational Conflicts of Interest.....	96
K. Construction Contracting.....	98
L. NAF Contracting	99
M. Information Technology.....	99
1. Regulatory Changes.....	99
2. Year 2000 Compliance.....	100
3. So, How Does the Year 2000 Problem Affect Procurements?	101
N. Multiple Award Schedules/ID/IQ	101
1. Navy Goes Against Grain of Competition in Contracting Act in Schedule Furniture Buy	101
2. The Limits of Discretion in Evaluating Schedule Quotes	102
O. Buy American Act	102
V. FISCAL LAW	103
A. Purpose	103
1. The Business Card Saga Continues	103

2. A Government Agency Can Fund Expanded Transition Assistance for Civilian Employees	103
3. The Army May Use One Appropriation to Supplement Another	104
B. Time	105
C. Liability of Accountable Officers	105
D. Nonappropriated Funds and Official Representation Funds.....	106
E. Revolving Funds	107
F. Judgment Fund.....	108
1. Court Upholds Jurisdiction Based on Availability of Judgment Fund.....	108
2. The Department of Justice Prohibited from Using Judgment Fund for Teamsters Election	109
Appendix A: DOD Legislation.....	110
Appendix B: Contract and Fiscal Law Websites	129
Guard and Reserve Affairs Items	135
CLE News.....	139
Current Materials of Interest	143
Individual Paid Subscriptions to <i>The Army Lawyer</i>	Inside Back Cover